State of Michigan

In the Supreme Court

Appeal from the Michigan Court of Appeals
Murray, P.J, and Kelly and Gleicher, JJ.

People of the State of Michigan, Plaintiff-Appellant,	Supreme Court No. 139396
vs	Court of Appeals No. 281408
Roberto Marchello Dupree, Defendant-Appellee.	Wayne County Circuit Court No. 06-008543-01

Brief *Amicus Curiae* of the Prosecuting Attorneys Association of Michigan

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Prosecuting Attorneys Association of Michigan

Brian A. Peppler P30307
President, PAAM
300 Court St
Sault Sainte Marie, MI 49783

David S. Leyton P35806
Genesee County Prosecuting Attorney

Submitted by:

Donald A. Kuebler P16282
Chief, Research, Training & Appeals
100 Courthouse
Flint, MI 48502
810-257-3854

Table of contents

Index of authorities

Cases

Statutes

Other Authorities

Rules

Treatises

Constitutional Provisions

Interest of *Amicus*

The Prosecuting Attorneys Association of Michigan file the instant brief *amicus curiae* in response the issue of whether the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon in possession) proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense. *People v Dupree*, Mich ___; 773 NW2d 261 (2009).

The more apt question in this case is whether the Court of Appeals has jurisdiction to reverse a felon-in-possession conviction for alleged error in supplemental jury instructions concerning the "justification" defense where neither the Legislature nor the Michigan Supreme Court has recognized the defense in relation to MCL 750.224f, and where even if the defense were available the defendant failed to sustain his burden of production and therefore an instruction on "justification" should not have been given.

Statement of question

Whether any of the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense.

Statement of facts

This case is before the Court pursuant to the order of October 21, 2009 granting the Wayne County Prosecutor's application for leave to appeal the Court of Appeals judgment entered March 28, 2009 reversing defendant's conviction for felon in possession of a weapon for alleged error in supplemental jury instructions and order for new trial consistent with the opinion. *People v Roberto Marchello Dupree*, 284 Mich App 89; 771 NW2d 470 (2009); *People v Roberto Marchello Dupree*, ____ Mich ___; 773 NW2d 261 (2009).

The majority opinion of Judge Kelly sets forth the background for the instant appeal and will not be repeated here. 284 Mich App at pp 91-97.

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The Court of Appeals reversed defendant's felon-in-possession conviction for alleged error in the supplemental jury instructions

Judge Kelly writing for reversal determined that it was error to instruct the jury that the justification defense based on duress or self-defense has application only as long as the defendant relinquished the unlawful possession of the weapon at the earliest possible opportunity once the danger has passed. Judge Kelly reasoned that the trial court's supplemental instruction that momentary innocent possession modifying the earlier instruction that defendant would not be guilty of felon- in-possession if he acquired the weapon during the struggle and only kept it as long as necessary to defend himself, effectively nullified defendant's defense of justification based on duress or self-defense. 284 Mich App at p 111, FN 4.

Judge Gleicher, in her concurring opinion for reversal, found that the trial court's supplemental instruction "actually foreclosed any possibility that the jury

would excuse defendant's brief possession of a firearm because it injected an unnecessary requirement –turning the weapon over to the police-that defendant unquestionably had not fulfilled. Judge Gleicher further concluded that the trial court's instruction was not merely imperfect, it essentially instructed the jury that defendant had failed to prove an essential element of the defense. 284 Mich App p 115]

Murray, P.J., dissenting, states that the only issue properly raised on appeal is whether the trial court erred in instructing the jury on the defense of temporary innocent possession as a defense to the charge of felon in possession. Judge Murray stated that rather than adopting the federal justification defense to a charge of felon in possession he would hold that because the facts did not support the defense, it should not be established in this case as a new rule of law in Michigan. Judge Murray found that because the defense was not supported by the evidence, the trial court's supplemental instruction was harmless. 284 Mich App at pp 124-125]

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Conspicuously missing from the majority opinion of Judge Kelly, the concurring opinion of Judge Gleicher and the dissenting opinion of Judge Murray, is any discussion of defendant's flight from the crime scene on September 11, 2005, his fear of returning to prison, his admitted failure to contact the police, the significance of his action of merely tossing the .38 caliber pistol out of his companion's truck on a service drive about a half mile from the crime scene, amounting to suppression of evidence, and his not being arrested for ten months on July 17, 2006, and his possession of .38 caliber pistol at the time of that arrest, and the legal effect, if any of

this trial evidence on the issue of whether the trial court's supplemental jury instruction requires reversal. Other pertinent facts will be set forth in the argument portion of this brief to properly posture the case for resolution by this Court.

Issue

Whether any of the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense.

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Judge Kelly observes that there are no published Michigan authorities directly addressing the application of traditional common-law defenses to felon-in-possession of a weapon. 284 Mich App at p 101. Citing *United States v Panter*, 688 F2d 268, 271 (5th Cir. 1982) and *United States v Bailey*, 444 US 394 (1980) and finding there is no indication the Michigan Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses to MCL 750.224f, Judge Kelly concludes that the defenses of duress and self-defense are applicable to a charge of felon-in-possession. 284 Mich App at p 107.

Argument

This Court requests briefing on whether any of the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon-in-possession) proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense.

The question presented is a matter of first impression in the Michigan Supreme Court. The Court of Appeals in reversing defendant's conviction for error in supplemental jury instructions, adopted the federal justification defense to the charge of felon-in-possession, MCL 750.224f.

Most jurisdictions have enacted statutes prohibiting individuals under indictment for, or conviction of a crime, generally a felony, from obtaining, carrying, or using firearms. The jurisprudence indicates that the courts have reached varying results in deciding whether the fact that the weapon was obtained for self-defense or to prevent its use against the defendant is available as a defense in a prosecution for violation of a statute prohibiting those under indictment or having been convicted of a crime from acquiring, having, carrying, or using firearms or weapons. The decisions are not consistent. Some jurisdictions hold that the fact that the weapon was acquired for self-defense or to prevent its use against the defendant is not available as a defense in a prosecution for felon in possession of a weapon. See 39 ALR 4th 967 (1985**), Fact that weapon was acquired for self-defense or to prevent its use against defendant as defense in prosecution for violation of state statute prohibiting persons under indictment for or convicted of, crime from acquiring, having, carrying or using firearms or weapons,** citing *State v Harrington*, 461 NW2d 500 (Neb. 1990); *Hodges v State*, 221 So 2d 922 (Ala. 1969), *cert den* 221 So 2d 923; *Webb v State*, 439 SW2d 342 (Tex.Crim. 1969), *cert den*, 396 US 968 (1969). On the other hand the annotator cites several cases where courts have recognized that the fact that the weapon was acquired for self-defense or to prevent its use against the defendant may be available as a defense in a felon-in-possession prosecution. See e.g., *People v King*, 148 Cal.Rptr 409 (1978); *State v Spaulding*, 296 NW2d 870 (Minn.1980); *Mugan v State*, (1984, Fla App DI).

In *United States v Baker*, 523 F3d 1141 (CA 10, 2008), (a case involving felon in possession of ammunition, 18 USC § 922(g)(1), although the request for rehearing

en banc was denied, McConnell, J., dissenting, aptly observed that the current state of the jurisprudence regarding implicit affirmative defenses is in disarray. See also 75 U. Chi. L. Rev. 1259, IS THERE A COMMON LAW NECESSITY DEFENSE IN FEDERAL CRIMINAL LAW?, where author Stephen S. Schwartz states that the question of whether the necessity defense exists in modern federal criminal law remains an open question. Mr. Schwartz states that "The Supreme Court has avoided deciding the question squarely, and lower courts have addressed it inconsistently." Mr. Schwartz argues that the defense should be available to defendants charged with federal crimes derived from the common law but elsewhere prohibited unless expressly provided for by statute.

It is noteworthy that in some jurisdictions affirmative defenses, such as duress, compulsion and justification are provided by statute. See e.g., *Gilbert v State*, 2010 WL 454966 (Tex.Crim. App.). In California the duress defense is of statutory origin. The necessity defense, unlike duress, is not codified, but, instead is a creation of decisional law. It is founded upon public policy and provides a justification distinct from the elements required to prove the crime. See *People v Fernandez*, 2010 WL 447250 (Cal.App. 2 Dist.)

The case *sub judice* provides this Court the opportunity to determine the applicability of common law defenses, if at all, to the crime of felon-in-possession of a weapon.

Michigan Common Law

Const 1963, art 3 section 7 provides:

> The common law and the statute laws now in force, not repugnant to this constitution shall remain in force until they expire by their own limitations or are changed, amended or repealed.

In Michigan both the Supreme Court and the legislature have the constitutional power to change the common law. *Placek v City of Sterling Heights*, 405 Mich 638 (1979). Other decisions have held that it is for the Michigan Supreme Court to decide whether a common-law rule shall be retained unless the legislature states a rule that is inconsistent with or performs a change in the common-law rule. *Gruskin v Fisher*, 405 Mich 51 (1979). Stated another way, "In Michigan the common law prevails except as abrogated by the Constitution, the Legislature or this Court." *People v Stevenson*, 416 Mich 383 (1982). See also MIJURCOMMIN LAW section 3, 5 Mich Civ Jur Common and Civil Law, section 3.

In Michigan "The Supreme Court has authority to promulgate and amend general rules governing practices and procedures in the Supreme Court and all other courts of record." Const 1963, Art VI, section 5 and MCL 600.223 are clear in that they address only this Court's authority to promulgate rules for practice and procedure in the courts of this state. *People v Lardie*, 452 Mich 231 (1996). The Michigan Supreme Court or the Legislature determines whether a common law defense is available. How the applicability will be limited, if permitted remains unanswered.

In this case, Judge Kelly, as a matter of practice and procedure, declares that a defendant may raise a justification defense to felon in possession by introducing evidence from which a jury could find that defendant meet meets five enumerated conditions. See 284 Mich App p 108.

Amicus questions whether the Court of Appeals had jurisdiction in this case to declare for Michigan "justification" as a defense to a charge of felon-in-possession of a weapon brought under MCL 750.224f. Amicus respectfully submits that since this Court has yet to recognize a justification defense in the context of a violation of MCL 750.224f, the justification defense has no legal basis in Michigan. *cf.*, *United States v Lapsley*, 2005 WL 1806360 (D.Minn.) where the court held that a defendant cannot show he was entitled to present a justification defense to the felon-in-possession because the Eighth Circuit Court of Appeals has yet to recognize a justification defense in the context of a violation of 18 USC section 922(g). In some jurisdictions such as Maryland, the constitution provides that the intermediate appellate court has jurisdiction to determine common law issues. See *Evans v State*, 481 A2d 1135 (1984); *Bowden v Caldor*, 710 A2d 267, 278 (1998). In North Carolina the Court of Appeals is foreclosed from abandoning the common law doctrine of misdemeanor manslaughter because it is the province of the legislature to change the accepted common law rule in that state. *State v Lane*, 444 SE2d 233 (CA NC 1994). On the other hand in the court in *United States v Tucker*, 407 A2d 1067 (DC 1979) held that the statute which provides that all common law in force in Maryland remains as part of the law of District of Columbia unless repealed or modified by statute, was not intended to operate as a bar to the inherent power of the Court of Appeals for the District of Columbia to alter or amend the common law. D.C.C.E. section 49-301.

Exemption from criminal responsibility--Justification

Nearly forty-three years ago, the State Bar published a revised criminal code for Michigan. Although it was not adopted, the publication is instructive. The final draft, Sept. 1967, of Michigan Revised Criminal Code, by the Special Committee of the Michigan State Bar and Committee on Criminal Jurisprudence, Commentary to Section 601, Title C: Exemptions From Criminal Responsibility, Chapter 6. Justification, sets forth the following discussion:

> "Anglo-American law generally restricts its formal statements of defense or justification to certain stereotypes such as self-defense, defense of others, or prevention of a felony. These are adequate to dispose of most instances which arise, but there are other situations which fail to fit the standard patterns, but which viewed from the standpoint of the goals of the criminal law do not warrant the imposition of criminal penalties. As the law traditionally stands, however, relief has to be afforded administratively, either through non-prosecution or by pardon following conviction. Non-prosecution is the most usual disposition because of the official or quasi-official position of the persons whose act come within the concept of justification, or because of the official imprimatur which underlies those acts. This accounts for the death of Michigan case authority on those matters."

Section 605, Justification: Choice of Evils, subsection (2) explains:

> The necessity and justifiability of conduct under subsection (1) may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. **Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would if established, constitute a justification.** (Emphasis added) (See p 60, 61)

The commentary following Section 635, [Duress] gives further insight regarding Michigan common law:

> The common law traditionally has denied that there are any circumstances of necessity other than those classified as self-defense,

> etc. In particular, most courts have denied the possibility that threat of immediate deadly force against the defendant's person, made by a person who is not a criminal accomplice of the defendant, is a sufficient basis for the killing of a third person. One Michigan case [*People v Repke*, 103 Mich 459, 471 (1895], however, seems to indicate that if there is instant and imminent fear of death, this might be sufficient to justify the commission of what otherwise would be a crime, on the analogy of certain statements in treason cases, though it failed to find any imminent threats on the facts of the case... (See p 70)

Section 645 **Burden of Injecting Issues of Justification** would change Michigan law and provided:

> Sec. 645. The burden of injecting the issue of justification under the preceding sections of this chapter is on the defendant, but this does not shift the burden of proof.

The Commentary explains:

> Though in most jurisdictions matters like self-defense or defense of others are viewed as affirmative defenses which the defendant must establish by a preponderance of the evidence, and though in terms of verbal logic these are matters in "confession and avoidance", **the Michigan Supreme Court has held that the burden of establishing justification is not on the defendant.** [*People v Stallworth*, 364 Mich 528 (1961); *People v Robinson*, 228 Mich 64 (1924). The decisions suggest by inference that the defendant must offer evidentiary material to raise the issue of a defense, but the jury is to be instructed that the burden of proving non-justifiability beyond a reasonable doubt remains on the state... [emphasis added.]

* * *

The allocation of burden of proof on affirmative defenses

The allocation of the burden of proof on affirmative defenses has been a vexing issue in the appellate courts throughout the nation in recent times. The process has created, understandably, difficult problems for trial courts. At common law, the burden of proof for all affirmative defenses of justification and excuse rests on the defendant. See *United States v Jumah*, 493 F3d 868 (7th Cir. 2007) citing *Dixon v*

United States, 548 US 1 (2006). See also *Patterson v New York*, 432 US 197, 202 (1977).

The Michigan felon-in-possession statute, MCL 750.224f, does not address the unforeseen and sudden situation where the prior convicted felon is threatened with impending danger. The Court of Appeals Judges in this case cite various federal and state court decisions grappling with the problem of the availability of a defense to weapons offenses used in defensive force situations. See also 2 CRLDEF section 121; 2 Crim. L. Def. section 121, Ch. 4 Justification Defenses, A. General Principles of Justification and citations. It is noteworthy here that in the Model Penal Code there are no common law offenses and no common law excuses or justifications surviving it either. See 42 Tex. Tech. L. Rev. 327, Winter 2009, Roger S. Clark, -- In General, Should Excuses be Broadly or Narrowly Construed? .

In contrast to the Michigan Supreme Court's forty nine year old decision in *Stallworth* and the eighty six year old decision in *Robinsion*, *supra*, several federal decisions involving felon-in-possession under 18 USC § 922, hold that the defendant has the burden of proving the affirmative defense of "justification" by a preponderance of the evidence. See e.g., *United States v Alston*, 526 F3d 91 (CA 3, 2008) and citations. Several State Court decisions are to the same effect. [See cases cited *infra* at p 14].

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The elements of felon in possession of a firearm in Michigan include a previous felony conviction and possession of a firearm. MCL 750.224f; *People v Perkins*, 473 Mich 626, 629-631 (2005). A person who violates the felon-in-

possession statute is guilty of a felony. MCL 750.224f(3); *People v Calloway*, 469 Mich 448, 452 (2003).

In criminal cases, it is well settled, indeed, virtually axiomatic, that the prosecution has the burden of proof beyond a reasonable doubt. See e.g., *In re Winship,* 397 US 358, 364 (1970). Accordingly, in the case *sub judice*, the prosecution had the burden of proving beyond a reasonable doubt every element of felon-in-possession of a weapon. No one questions this basic proposition. But contemporary jurisprudence provides that it is constitutionally permissible to place on the defendant the burden of proving affirmative defenses by a preponderance of the evidence, as long as the defendant is not required to negate an element of the offense. See *Dixon v United States,* 548 US 1; 126 S Ct 2437; 165 L Ed 2d 299 (2006). [Interpreting federal statutes as requiring defendant to prove duress by a preponderance of the evidence]. See also *People v Lemons*, 454 Mich 234 (1997).

In *Dixon* the Court granted *certiorari* to resolve a division of authority in the courts of appeals concerning whether the government or the defendant bears the burden of proof on a duress defense to 18 USC section 922 charge. (The Court concluded that the defendant bears the burden.) Absent an act of Congress on the issue, criminal defendants were required to prove by a preponderance of the evidence the elements of an affirmative defense that did not negate an element of the offence. *Id.* at 2440.

While the Court did not explicitly evaluate whether duress and the common law justification defenses are available in a section 922 case, the Court did say that "it would be unrealistic to read [the statute and its legislative history] as implicitly doing

away with a defense as strongly rooted in history as the duress defense." Nevertheless, the *Dixon* Court merely assumed *arguendo* that a defense of duress was available. *Id.* at 2445. See *United States v Holliday*, 457 F3d 121 (1str Cir. 2006) where the court likewise assumed *arguendo* that Congress intended to allow the defenses of necessity, duress, and self defense in a section 922 prosecution.

Given the United Supreme Court's holding in *Dixon*, and the above-referenced decision in *United States v Holliday*, and this Court's decision in *People v Lemons*, *amicus* will assume *arguendo*, that the defenses of necessity, duress and self defense are permitted in Michigan.

In answer to this Court's question of whether the defendant has the burden of proof to establish any of these common law defenses, the answer is that it is the defendant's burden. See also *Martin v Ohio*, 480 US 228 (1987) [Ohio law may permissibly require defendants charged with murder to prove self-defense by a preponderance of the evidence]; *Moss v Superior Court,* 17 Cal 4th 396 (1998) [person charged with criminal contempt for failure to comply with child support order must prove inability to comply with the order by a preponderance of the evidence.] See also *State v New*, 640 SE2d 871 (2007); *State v Glover*, 2009 WL 17858 (.N.J.Super.A.D.); *United States v Gatti*, 2008 WL 4500329(W.D.La.).

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Court of Appeals reversal for alleged error in supplemental jury instructions should be reversed by this Court and defendant's conviction for violation of MCL 750.227f reinstated.

Michigan's felon-in-possession of a firearm statute, MCL 750.227f and the substantially similar federal statute, 18 USC § 922(g)(1), is a strict liability offense,

which ordinarily renders a defendant's state of mind irrelevant. See e.g., *United States v Funches*, 135 F3d 1405, 1407 (1998).

MCL 750.224f provides:

> "Except as provided in subsection(2), a person convicted of a felony shall not possess, ... a firearm in this state until ..."

The justification defense

The Court of Appeals in this case reviewed various federal and state court decisions with respect to the application of the common law defenses of duress, necessity and coercion in relation to felon-in-possession statutes. In this case Kelly, J., determined that the referenced common law defenses apply to felon-in-possession of a weapon even though the statute does not provide for a "justification" defense. 284 Mich App at p 107.

At the federal level, 18 USC § 922(g) likewise does not provide for a justification defense. While the United States Supreme Court has questioned "whether federal courts ever have authority to recognize a necessity defense not provided by statute," *United States v Oakland Cannabis Buyers' Corp.*, 532 US 483, 490 (2001), several federal courts of appeal have recognized that justification is a valid defense to a felon-in-possession charge under 18 USC § 922(g). See generally *United States v Paolello*, 951 F2d 537 (3d Cir. 1991) ("while the defenses of justification and duress were at one time distinct ...'[m]odern cases have tended to blur the distinction between duress and necessity .' " (quoting *United States v Bailey*, 444 US 394, 410 (1980)). See also *United States v Dodd,* 225 F3d 340 (3d Cir. 2000); *United States v Leahy*, 473 F3d 401, 406 (1st Cir. 2007); *United States v Salgado-Ocampo*, 159 F3d 322, 327 n. 6 (7th Cir. 1998); *United States v Gomez*, 92 F 3d 770, 774 (9th Cir. 1996);

United States v Butler, 485 F3d 569, 592 n. 1 (10th Cir. 2007); *United States v Mooney*, 497 F3d 397, 404 (4th Cir. 2007); *United States v Panter*, 688 F2d 268, 269-672 (5th Cir. 1982) (court found a justification defense exists under predecessor statute to 18 USC 922).

For State cases see *State v Jeffrey*, 889 P2d 956 (Wash App, 1995) citing various decisions holding that a necessity defense instruction may be required in certain circumstances as a defense to the crime of unlawful possession of a firearm. [*People v King*, 22 Cal.3d 12 (1978); *Mungin v State*, 458 So2d 293 (Fla.Dist. Ct. App. 1984); *People v Govan*, 523 NE2d 581, 586 (Ill App 3d, 1988); *State v Walton*, 311 NW2d 113 (Iowa 1918); *State v Blache*, 480 So2d 304 (La, 1985); *State v Crawford*, 521 A2d 1193, 1199 (1987); *State v Spaulding*, 296 NW2d 870 (Minn, 1980); *Johnson v State*, 650 SW2d 424 (Tex Crim.App. 1983).]

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Judge Kelly determined that as a matter of practice and procedure that a defendant may raise justification as a defense to a felon-in-possession charge by introducing evidence from which the jury could conclude **all** the following:

> (1) The defendant or another person was under an unlawful and immediate threat that was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm and the threat actually caused a fear of death or serious bodily harm in the mind of the defendant at the time of the possession of the firearm.
>
> (2) The defendant did not recklessly or negligently place himself or herself in a situation where he or she should be forced to engage in criminal conduct.
>
> (3) The defendant had no reasonable legal alternative to taking possession, that is, a chance to both refuse to take possession and also avoid the threatened harm.

(4) The defendant took possession to avoid the threatened harm, that is, there was a direct causal relationship between the defendant's criminal action and the avoidance of the threatened harm.

(5) The defendant terminated his or her possession at the earliest possible opportunity once the danger had passed.

284 Mich App at p 108

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The Court of Appeals reversal for alleged error in supplemental jury instructions

Judge Kelly found that defendant Dupree introduced evidence from which a reasonable jury could have concluded that each element of the justification defense per his five point criteria, had been met. 284 Mich App at 108-110. Judge Kelly determined that the trial court's supplemental instruction requiring a jury finding that defendant turned the weapon over to the police to be found not guilty effectively nullified defendant's defense that his continued possession was excused under a duress or self-defense theory. 284 Mich App at 111-112.

Judge Gliecher, concurring for reversal, 284 Mich App at pp 112-117, found the supplemental instruction "actually foreclosed any possibility that the jury would excuse defendant's brief possession of a firearm because it injected an unnecessary requirement—turning the weapon over to the police-that defendant unquestionably had not fulfilled. Judge Gleicher also states that the trial court's instruction was not merely imperfect; it essentially instructed the jury that defendant had failed to prove an essential element of the defense. Further, "When the trial court added to the instruction the requirement that defendant had to promptly turn the weapon over to the police, it negated defendant's claim of self-defense." Amicus respectfully submits

that Judge Gleicher's opinion here is inaccurate because the jury accepted defendant's self-defense posture and acquitted him of the assault charges. Also Judge Gleicher's conclusion that defendant's possession of the firearm was "brief" fails to take into account the fact that he possessed the gun for a half mile while a passenger in his companion's truck before he tossed it. The opinion also fails to consider defendant's admitted possession of a .38 caliber pistol at the time of his arrest on July 17, 2006.

Judge Kelly determined that defense counsel's objection to the supplemental instruction was correct "because he felt that his theory of self-defense did not require a finding that Dupree intended to turn the gun over to the police, rather Dupree's unlawful possession was excused as long as his possession was necessary to ensure his protection." Amicus disagrees with Judge Kelly's conclusion. Neither the Court of Appeals nor counsel for defendant cite any legal authority holding continued possession of a weapon after shooting an aggressor in self-defense is lawful because a jury could find the possession was warranted because the assault victim might retake the weapon. It does not follow that because defendant was justified in the actual shooting of the weapon under the particular circumstances existing at the moment, that continued possession is not unlawful. Even if an unlawful and present threat existed when Dupree took the gun from Reeves and shot him, it was no longer true when he fled the scene. Under the decisions the defense of justification does not apply to defendant's possession of the gun when he "was no longer in imminent danger of death or serious bodily injury." *United States v Williams*, 389 F3d 402 (2004) citing *United States v Singleton*, 902 F2d 471, 473 (6th Cir. 1990); *United States v Stover*,

822 F2d 48, 50 (8th Cir. 1987) and *United States v Beasley*, 346 F3d 930, 935-936 (9th Cir. 2003).

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The decisions hold that a defendant need not present any evidence at trial. The prosecution bears the burden of proving each element of a charged offense beyond a reasonable doubt, but it need not prove the nonexistence of all affirmative defenses. Federal decisions advise that before an instruction on a proposed defense may be given to the jury, there must be sufficient evidence presented either by the government or by the defendant to support the proposed defense. If the defendant wishes to raise an affirmative defense at trial, he must bring the proposed affirmative defense to the attention of the court, *United States v Engstrum*, 2009 WL 1683285 (D.Utah) citing *United States v Prentiss,* 256 F3d 971, 975 n 2 (10th Cir. 2001), and the court must determine whether the affirmative defense is legitimate. The court must also make a determination regarding the type of affirmative defense being asserted by the defendant. The court further explains:

> ...If the defendant asserts an affirmative defense which negates an element of the crime, the government must establish beyond a reasonable doubt that the affirmative defense does not apply. If, however the defendant asserts an affirmative defense that "does not serve to negative" any element of the crime, the Court may require defendant to bear the burden of persuad[ing] ... the tribunal of the existence of the facts supporting the defense.

In *United States v Blankenship*, 67 F3d 673 (8th Cir. 1995) the defendant entered a conditional guilty plea to felon in possession of a firearm. He appealed pretrial rulings. The government sought to exclude testimony defendant intended to offer to prove a justification or coercion defense. The district court sustained the

government's motion, finding that even if the court were to recognize such defense the defendant had not presented evidence on every element necessary to submit the defense to the jury. The court citing *United States v May*, 727 F2d 764, 765 (CA 8, 1984) (quoting *Shannon v United States*, 76 F2d 490, 493 (CA 10, 1935) said that "Even if we were to recognize a justification defense, evidence of either justification or coercion may be stricken if defendant is unable to present proof of all elements of the defense. *Id.* Reviewing Blankenship's proffer the court found that defendant had reasonable legal alternatives to possessing the shotgun. That is, "Instead of going for the gun, he could have gone for help himself or sent his wife to the neighbors' residence to call the police as he did after the shooting. There was no evidence that Kellick was armed or presented a real threat of serious harm to Blankenship or his family. Given this record, even if we were to recognize a defense of justification, neither that defense nor the defense of coercion would be available to Blankenship. Consequently the district court properly sustained the government's motion to exclude the testimony.

See also *United States v Grissom*, 44 F3d 1507, 1512 (10th Cir. 1995).

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In reviewing the trial evidence Judge Kelly said that although there was testimony that the physical struggle had ended and the parties had separated, "it not entirely clear whether Reeves actually left the scene before or after Dupree left with his female companion." Judge Kelly says that defendant's request to charge should have been granted because "Given this testimony **a jury could have** found that it was

reasonably necessary for Dupree to maintain possession in order to ensure that Reeves did not return and try to retake possession of the gun. Consequently, Dupree introduced sufficient evidence to present a justification defense."

Amicus disagrees with Judge Kelly's assessment. Contrary to the suggestion of Judge Kelly, the jurisprudence holds that a "generalized fear" of harm does not support the defense even where it is recognized. *United States v Lomax*, 87 F3d 959, 961 (8th Cir, 1996). "To warrant the defense the defendant must show, among other things, that he was under an imminent threat of death, or serious bodily injury and he had no reasonable, legal alternative to violating the law." *United States v Cage*, 149 Fed. Appx. 545, 546 (8th Cir, 2005); See also *United States v Enlow*, 2007 WL 5231706 (D.N.M). In the absence of a showing that he could have met these elements a defendant fails to show that he has a submissible case for jury consideration.

Whether or not a defendant has established a *prima facie* case for the defense of justification or necessity is a question of law that is reviewed *de novo*. *United States v Ridner*, 512 F2d 846 (6th Cir. 2008) citing *United States v Johnson*, 416 F3d 464, 468 (6th Cir, 2005). The *Ridner* court further explains:

> ... The defendant's preliminary burden is "not a heavy one" and is met even where there is "weak supporting evidence." *United States v Riffe*, 28 F3d 565, 569 (6th Cir. 1994). Further, the trial judge's duty is to require a *prima facie* showing by the defendant on each of the elements of the defense. *Johnson*, 416 F3d at 467-68 ("Where 'an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.'") (quoting *United States v Bailey*, 444 US 394, 416(1980).

In *United States v Harper*, 802 F2d 115, 117 (5th Cir, 1986), a convicted felon, was found guilty of federal firearms violations arising from the purchase and possession of weapons. Defendant's conviction was affirmed because the court found that the defendant did not avail himself of reasonable legal alternatives to possession of a firearm, and thereby rejected his "justification" defense. The opinion explains:

> The Fifth Circuit has established the four elements of the justification defense to a charge of violating 18 USC App. Section 1202(a)(1). [footnote omitted] The defendant must show (1) that defendant was under an unlawful and "present, imminent, and impending [threat] of such a nature as to induce a well-grounded apprehension of death or serious bodily injury"; (2) that defendant had not "recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]"; (3) that defendant had no "reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm;'" and (4) "that a direct casual relationship may be reasonably anticipated between the [criminal] action taken and the avoidance of the [threatened] harm.

In *United States v Gant*, 691 F2d 1159, 1163-1164 (5th Cir. 1982), the defendant, a felon, was convicted of possessing a firearm. The Court affirmed his conviction because he did not avail himself of legal alternatives to possession of a firearm.

> As the Supreme Court emphasized in *Bailey*, "one principle of these justification defenses remains constant: if there was a reasonable, legal alternative to violating the law, ... the defense will fail." *Bailey*, 444 US at 410. In demonstrating that he had no reasonable alternative to violating section 1202, Gant must show that he had actually tried the alternative or had no time to try it, or that a history of futile attempts revealed the illusionary benefit of the alternative. See *Id.* At 410-411 (citing *People v Richards*, 75 Cal Rptr 597 (1969); and *United States v Boomer*, 571 F2d 543, 545 (10th Cir. 1978); *cert den sub nom Heft v United States*, 436 US 911 (1978), for the minimum showings needed to justify prison escape). **The most obvious legal remedy that Gant failed to pursue was simply to call the police. See *R.I. Recreation Center, Inc v Aetna Casualty & Surety Co.*, 177 F2d 603 (1st Cir. 1949) (denying the duress defense**

because defendant did not call the police when he had an opportunity to do so.) *Gant*, 691 F2d at 1163-1165.

[Emphasis added]

The defendant in *United States v Perez*, 86 F3 735, 736 (7th Cir. 1996) was convicted of felon in possession of a firearm, 18 USC 922(g), and on appeal, argued that the trial court erred by refusing to instruct the jury on the defenses of necessity and duress. The defendant said he wanted to go to the bank in order to deposit $600. He was fearful of being robbed when he left his apartment so he took his girlfriend's pistol with him before leaving. The Seventh Circuit found that, as a matter of law, the defendant was not entitled to a justification instruction in this situation.

> If ex-felons who feel endangered can carry guns, felon-in-possession laws will be dead letters. Upon release from prison most felons return to their accustomed haunts. Even those who go straight will in all likelihood continue to live in dangerous neighborhoods and consort with some dangerous people. Many of them will no go straight, but will return to dangerous activities such as the drug trade. Every drug dealer has a well grounded fear of being robbed or assaulted, so that if [the defendant's] defense were accepted felon-in-possession laws would as a practical matter not apply to drug dealers.
>
> The defense of necessity will rarely lie in a felon-in-possession case unless the ex-felon, *not being engaged in criminal activity*, does nothing more than grab a gun with which he or another is being threatened (the other may be the possessor of the gun, threatening suicide.) *Perez,* 86 F3d at 737. [Emphasis added]

See also *United States v Bastanipour*, 41 F3d 1178, 1183 (7th Cir. 1994); *United States v Wheeler*, 800 F2d 100, 107 (7th Cir. 1986).

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The supplemental jury instructions at issue in this case

As a general proposition in order for appellate relief to be granted on the basis of incorrect jury instructions, the defendant must show more than that the instructions

are undesirable, erroneous or universally condemned; rather, taken as a whole they must be so infirm that they rendered the entire trial fundamentally unfair. See *Estelle v McGuire*, 502 US 62, 67 (1991); *Henderson v Kibbe*, 431 US 145, 154 (1997). If an instruction is ambiguous and not necessarily erroneous, it violates the Constitution only if there is a reasonable likelihood that the jury has applied the instruction improperly. *Binder v Stegall*, 198 F3d 177, 179 (6th Cir. 1999). A jury instruction is not to be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record. *Grant v Rivers*, 920 F Supp 769, 784 (E.D. Mich 1996). Other decisions hold that "To secure reversal based on a flawed jury instruction, a defendant must demonstrate both error and ensuing prejudice." *United States v Quinones*, 511 Fed 289, 313-314 (2nd Cir.2007) *cert. denied*, US , 129 S Ct 252 (2008). Also *de novo* review is conducted of a claim of error in jury instructions, *Id.*, at 314, including a claim that the trial court improperly declined to instruct the jury regarding an affirmative defense. *United States v Gonzalez*, 407 F3d 118, 122 (2nd Cir, 2005), "we will reverse only where the charge, viewed as a whole, 'either failed to inform the jury adequately of the law or misled the jury about the correct legal rule.'" *Quinones*, 511 F3d at 314 (quoting *United States v Ford*, 435 F3d 204, 209-210 (2nd Cir. 2006)).

United States v Ford, 435 F3d 204, 209-210 (2nd Cir. 2006). Also a federal court may decline to instruct on an affirmative defense, moreover, "when 'the evidence in support of such a defense would be legally insufficient.'" *United States v Williams*, 389 F3d 402, 404 (2nd Cir. 2004) (quoting *United States v Villegas*, 899 F2d 11324, 1343 (2nd Cir. 1990); see also *Gonzalez*, 407 F3d at 122 ("A defendant is

entitled to an instruction on an affirmative defense only if the defense has 'a foundation in the evidence.'" (quoting *United States v Podlog*, 35 F3d 699, 704 (2nd Cir. 1994)).

Under pertinent federal case law, the trial court's decision to give the jury a supplemental instruction is reviewed for abuse of discretion. In *United States Romero*, 57 F3d 565 (7th Cir. 1995) the Seventh Circuit concluded that a trial judge was "without question" acting within its discretion when he provided a supplemental instruction which properly stated the law and correctly responded to the jury's request for a definition." See also *United States v Sanders*, 962 F2d 660, 677 (7th Cir. 1992), *cert. denied* 121 Led 2d 192 (1992).

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Dissenting Judge, Murray, P.J. correctly states that "Temporary innocent possession" was the defense at issue in the Court of Appeals. Further, the only Federal Circuit Court of Appeals to have endorsed it specifically stated that the innocent possession defense requires that the defendant establish: (1) the firearm was attained innocently and held with no illicit purpose and (2) possession of the firearm was transitory, i.e., in light of the circumstances presented, there is a good basis to find that the defendant took adequate measures to rid himself of possession of the firearm as promptly as reasonably possible. In particular, "a defendant's actions must demonstrate both that he had the intent to turn the weapon over to the police and that he was pursuing such an intent with immediacy and through a reasonable course of conduct." *United States v Lindsey*, 2009 WL 4023131

(D.Del.), citing *United States v Mason*, 233 F3d 619, 624 (D.C.2000) (quoting *Logan v United States,* 402 A2d 822, 827 (D.C. 1979). See 284 Mich App 117-225.

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Michigan decisions, in accord with the above-referenced federal cases, state that jury instructions should clearly present the case and applicable law to the jury. *People v McGhee*, 268 Mich App 600, 606 (2005); *People v McKinney*, 258 Mich App 157, 162 (2003). Instructions must include the elements of the charged crimes and material issues, defenses, and theories if supported by the evidence. *McKinney* at 162-163. Stated another way it is the duty of the trial court to inform the jury of the law by which its verdict must be controlled and if necessary to assist it, by whatever illustration the case may require to apply the law to the facts. Instructions regarding the applicable law must come from the trial court, and even in the absence of requests from counsel, it is the duty of the court to see that the case goes to the jury in a clear and intelligent manner, so that the jurors may have a correct understanding of it. See MICRIMLP section 20:304 and citations; see also MCR 6.414 (H); MCL 768.29 and citations see also MCR 6.414 (H); MCL 768.29 and citations.

On appeal the court reviews instructions in their entirety to determine if there was error requiring reversal. Even if instructions are imperfect, there is no error requiring reversal if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Aldrich*, 246 Mich App 101, 124 (2001).

Amicus submits that a fair reading of the trial transcript demonstrates that the trial court was punctilious in the exercise of its discretion and was determined to give

the jury a supplemental instruction which correctly stated the law. [See in-camera discussion, Vol. III, p 5-13 and instructions at p 14-15]

What is certain in this case is that the trial court was instructing the jury with respect to the factor of whether defendant had a reasonable alternative to both the criminal act of possessing the gun and avoidance of a threatened harm. The facts at trial do not show Dupree had no other alternative to continued possession. In *Mooney,* the court noted with favor "the district court's attentiveness to a felon's continued possession of a firearm after justifiably gaining possession. [2007 WL 2231164, p 10] The court stated that "[s]uch attention is necessary for application of the defense."

What stands out in this case is that Dupree did not take any action toward reasonable, legal alternatives to violating the law. "The purpose of requiring the defendant to show that he had no legal alternative to violating the law is to force an actor to evaluate the various options presented and choose the best one because in most cases, there will be a clear legal alternative." *United. States v Holmes*, 311 Fed.Appx. 156 citing *United States v Baker*, 508 F3d at p 1326.

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In the case *sub judice* defendant Dupree requested a different jury instruction from the one actually given, but the defendant bears the burden of showing that his requested instruction accurately represented the law in every respect. See e.g., *United States v Nektalov*, 461 F3d 309, 313, -14 (2d Cir. 2006). Defense counsel contended that his theory of self-defense did not require a finding that defendant intended to turn the gun over to the police because defendant's unlawful possession was excused as

long as the possession was necessary to ensure his protection. Judge Kelly found that defense counsel was correct. 284 Mich App at p 111.

Defendant Dupree's evidence failed to establish a justification defense to the charge of felon in possession of a weapon

Amicus disagrees with Judge Kelly's assessment. Conspicuously missing from the majority and concurring opinions and the dissent as well, is a discussion of defendant's flight from the crime scene and his action amounting to suppression of evidence in merely tossing the gun from his companion's truck as they fled and defendant's arrest ten months later and his admitted possession of a gun at the time of his arrest for a traffic violation in the city of Detroit.

Police Officer Jason Neville testified that when defendant was arrested July 17, 2006 a search of his vehicle disclosed a .38 caliber Tarus revolver with six live rounds. The gun was admitted without objection as People's Exhibit. #8. [p14] Officer Lucas [19] also testified that defendant told him that the gun found in the console of the auto was "mine." [25]

Victim Reeves also identified People's Exhibit # 8 as being similar to the weapon that he had been shot with by defendant. [Vol II p 91]

Defendant Dupree's testimony was that after he shot victim Reeves three times in the chest, Dupree directed Reeves to "just stop" and to "let go." Reeves thereafter wandered over to a neighboring house. Meanwhile defendant Dupree walked back to the porch and asked Adrian to see if he (defendant) had been hit. Defendant stated that his female companion came out and said "lets go" and he went with her. Defendant testified as they drove off his companion told him to get rid of the gun and he threw it out the window. 284 Mich App at pp 94-95. [See also p 13, 14] More specifically

defendant testified on examination by defense counsel that he kept the gun with him while fleeing the scene with his companion and he did not rid himself of the gun until she told him to get it out of her truck, "So I threw it. We turned down the service drive, Southfield Service Drive and I threw it out of the window." Defendant testified that he was arrested ten months later. [p 31] On cross-examination by the prosecutor defendant said he just threw the gun out of the truck on the Southfield Service Drive before he got to Warren. [p 37] At p 42 defendant testified that when he was arrested ten months later, on July 17, 2006, there was a .38 caliber weapon in his vehicle. On questioning by the prosecutor defendant said he fled because he did not want not go back to prison. [See Prosecutor's brief p 7] He also agreed that the gun he used to shoot Reeves with might have had his fingerprints, and notwithstanding that possibility, he just tossed the gun out of the window of his companion's truck. [Prosecutor's brief p 9] See also Prosecutor's closing argument at p 76 and felony firearm instructions at p 85.

Taking in to account defendant's flight during the discussion concerning supplemental instructions, the trial court said that the jury could take into account defendant's admitted possession of the .38 caliber weapon found in his vehicle ten months after the charged assaultive conduct. "Now if he kept it longer than necessary and if they think that the gun was introduced in evidence was his and he kept it for that period of time, [10 months] he could be guilty of felon in possession. Because witnesses said that looks like the gun, now that's enough. They can believe he kept it, or they can believe he tossed it like he said." [p 104] Under the Michigan decisions "A jury may infer consciousness of guilt from evidence of lying or deception." *People*

v Unger, 278 Mich App 210, 227 (2008). Additionally, evidence of flight is circumstantial evidence of "consciousness of guilt" and accordingly, the fact of guilt itself. *People v Smelley*, 285 Mich App 314, 333 (2009).

As heretofore stated the decisions recognizing the "justification" defense in felon-in-possession of a weapon cases, hold that the defendant seeking a justification instruction must produce evidence that he took reasonable legal steps to dispossess himself of the weapon once the threat entitling him to possess it abated. *United States v Ricks*, 573 F3d 198 (4th Cir. 2009).

In determining whether to instruct the jury on a justification defense or whether to preclude jury consideration of the same, the decisions take into account whether the defendant had viable legal alternatives to possessing a weapon. *United States v Mercer*, 2010 WL 286610 (10th Cir.(N.M.) (District court justifiably found threat to defendant was not immediate, making it feasible for him to have considered all of his options and pursue a lawful one " Such as seeking advice and protection from law enforcement officials."); *State v Mowell*, 672 NW2d 389 (Neb. 2003) (Mowell had ample opportunity to go to the police); *United States v Harkness*, 305 Fed. Appx. 578, 2008 WL 5411455 (C.A. 11 Fla.) (it was undisputed that defendant had a cellular telephone on him at the time he allegedly found the firearm; therefore, he could have immediately contacted law enforcement to report the gun—district court properly refused to instruct the jury on the defense of justification because defendant had a reasonable alternative to keeping the gun in his possession.); *United States v Kemp*, 546 F3d 759 (6th Cir, 2008) (refusal to instruct on justification affirmed where the court found defendant should have called the police upon taking possession of the gun.

Instead he kept it in his pocket until the police stopped his vehicle and took the gun away. "The district court was correct, therefore, in refusing to give a justification instruction. No reasonable jury could have found that all the elements of the defense—or even more than one of them—were met in this case."); *United States v Butler*, 485 F3d 569 (10th Cir. 2007) (Defendant who was threatened by third party when he was instructed to keep the gun for possible murder of another was not entitled justification instruction for being felon in possession of a firearm absent evidence from which the jury could find that defendant had no legal reasonable alternatives to possessing the gun; prompt relinquishment of gun and disclosure of circumstances to police was not rendered impossible by defendants distrust of ability of police to protect him.); See also *United States v Gant*, 691 F2d 1129 (5th Cir. 1982) (The most obvious legal remedy that Gant failed to pursue was simply to call the police.)

In the case *sub judice* the evidence presented by defendant Dupree does not permit the conclusion that after Dupree disarmed Reeves, he took immediate reasonable legal steps to dispossess himself of the .38 caliber pistol.

In *Ricks*, *supra*, the court rejected the notion that a defendant does not act reasonably to dispossess himself of a gun because he did not immediately turn it over to the police. The court explained:

> ...In *Mooney*, we found that the defendant would have been able to satisfy prong three of the *Crittendon* test because the evidence showed that after he disarmed his intoxicated ex-wife, **"[t]he trajectory of Mooney's actions all pointed toward handing over the gun to the police." 497 F3d at 408.** This conclusion, however, did not create a *bright-line rule* that the only reasonable way for a felon to dispossess himself of a gun he has justifiably come to possess is to turn that gun over to the police. Mooney's method of dispossession was a reasonable one, not the only reasonable one. Given the facts of this case, a reasonable trier of fact could find that Rick's conduct was **"necessary**

> **and efficient in disposing of the gun."** ***id.*** **At 407**, because he took possession of the gun no longer than needed to avoid threatened harm from Blue and then dispossessed himself of the gun by placing it somewhere where Blue, the gun's owner, could retrieve it once in a better frame of mind.

The court goes on to explain:

> In many cases, a defendant's options for reasonable dispossession of a firearm may include turning the gun over to the authorities, but that is not the only option, and ultimately, the reasonableness of defendant's course of conduct is a question for a jury. For purposes of determining the propriety of a jury instruction on justification, we need only see whether there is sufficient evidence for a jury to conclude that the defendant's actions were reasonable, and we find that there was sufficient evidence here.

In *Ricks* the court found that it was reversible error to deny a jury instruction on justification.

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While the Court in *Ridner* said that the *Mooney* decision did not create a bright line rule regarding turning a weapon over to police authorities, case after case cite calling the police as a reasonable legal alternative to possession a weapon.

See again *United States v Mercer*, 2010 WL 286610 (10th Cir.(N.M); *State v Mowell*, 672 NW2d 389 (Neb. 2003); *United States v Harkness*, 305 Fed.Appx. 578, 2008 WL 5411455 (C.A. 11 Fla.); *United States v Kemp*, 546 F3d 759 (6th Cir. 2008);*United States v Butler*, 485 F3d 569 (10th Cir. 2007); *United States v Gant*, 691 F2d 1129 (5th Cir. 1982); and *United States v Robinson*, 304 Fed. Appx. 746; 2008 WL 5377743 (.A. 10 (Okla.).

* * *

Judge Kelly found that the trial court's supplemental instruction "effectively directed a verdict of guilty on the charge of felon-in-possession." 284 Mich App at p

112. Judge Gleicher, concurring for reversal, states that while the facts were unclear as to whether Dupree gave up the gun as soon as the claimed duress lost its coercive force, found the supplemental instruction deprived defendant of his constitutional right to present a defense and that it "actually foreclosed any possibility that the jury would excuse defendant's brief possession of a firearm because it injected an unnecessary requirement—turning the weapon over to the police-that defendant unquestionably had not fulfilled. Judge Gleicher said that it appeared likely that the jury rested its verdict entirely on the basis that defendant lacked any intent to turn the weapon over to the police and that the instructional error was thus not harmless. Further, the trial court's instruction was not merely imperfect; it essentially instructed the jury that defendant had failed to prove an essential element of the defense. Judge Gleicher further concluded that: "When the trial court added to the instruction the requirement that defendant had to promptly turn the weapon over to the police, it negated defendant's claim of self-defense."

Amicus submits that reversal is improper here. Defendant's conviction cannot be said to be the result of instructional error. On the contrary, Amicus submits that defendant's own testimony led to his conviction for felon-in-possession. [In his testimony defendant told of his flight from the crime scene on September 11, 2005, carrying the gun for a half mile before tossing it on a service drive, amounting to suppression of evidence, his fear of returning to prison, his admitted failure to contact the police, and his admitted possession of a .38 caliber pistol when arrested for a traffic offense ten months later on July 17, 2006.] Judge Gleicher's opinion is also

inaccurate because the jury accepted defendant's self-defense posture and acquitted him of the assault charges.

Judge Kelly found that defense counsel objected to the supplemental instruction "because he felt that his theory of self-defense did not require a finding that Dupree intended to turn the gun over to the police, rather Dupree's unlawful possession was excused as long as his possession was necessary to ensure his protection." Judge Kelly asserts that **defense counsel was correct**. Again, Amicus disagrees with Judge Kelly's conclusion. Neither the Court of Appeals nor counsel for defendant cite any legal authority holding continued possession of a weapon after shooting an aggressor in self-defense is lawful because a jury could find the possession was warranted because the assault victim might retake the weapon. It does not follow that because defendant was justified in the actual shooting of the weapon under the particular circumstances existing at the moment that continued possession is not unlawful.

The court in *People v Fernandez*, 2010 WL 447250 (Cal.App.2 Dist.) (although non-published) gives some insight concerning the duress defense.

> "The duress defense, through its immediacy requirement, negates an element of the crime-the-intent to commit the act. The defendant does not have the time to form criminal intent because of the immediacy and imminency of the threatened harm and need only raise a reasonable doubt" that he acted in the exercise of his free will. (citation) For that reason, threats of future danger are inadequate to support the defense. "Decisions upholding the duress defense have uniformly involved '"a present and active aggressor threatening immediate danger."' [Citation] A 'phantasmagoria of future harm' such as a threat of death to be carried out at some undefined time, " does not support a duress claim. (*People v Petznick*, 114 Cal.App.4th 663, 676-677.)

Judge Kelly says that although there is testimony that the physical struggle had ended and that the parties had separated, it is **not entirely clear** whether Reeves

actually left the scene before or after Dupree left with his female companion. "Given this testimony, **a jury could have found** that it was reasonably necessary for Dupree to maintain possession in order to ensure that Reeves did not return and try to retake possession of the gun. Consequently, Dupree introduced sufficient evidence to present a justification defense."

Judge Kelly's discussion has no record support. Just how the jury could find defendant kept the gun to insure that Reeves would not retake the weapon is not explained. Here, defendant, by his own testimony, was fleeing from the crime scene in a truck after he shot the victim three times in the chest. According to the prosecutor's brief defendant was about one half mile from the crime scene before he threw the gun out of the truck. [See prosecutor's brief at p 8 footnote 3] Contending that defendant was justified in retaining the gun for an extended period of time has no factual predicate and under these circumstances just doesn't make sense. Such conclusion is clearly erroneous. *cf.*, *United States v Jackson*, 282 Fed.Appx. 999 (3rd Cir. 2008).

Amicus disagrees with Judge Kelly's approval of defense counsel's request to charge. A jury instruction on justification should not be given if the defendant lacks evidentiary support or is based upon mere suspicion on or speculation. Judge Kelly's contention has no foundation in law and is contrary to such decisions as *United States v Lewis, et al,* 2010 WL 373784(6th Cir. (Ky.) citing *United States v Kemp*, 546 F3d 759, 765 (1st Cir. 2008). In *Lewis* the court also states that a jury instruction for self-defense places the burden on the government beyond a reasonable doubt, while the defendant has the burden of establishing other justification has several additional

elements that a defendant must establish above and beyond those in a self-defense instruction."

Judge Kelly found defense counsel's objection to the trial court's supplemental instruction that to be found not guilty of felon in possession required that he intended to turn the gun over to the police within a reasonable time was improper because it was his theory of self-defense that his unlawful possession was necessary to ensure his protection. 284 Mich App at 111 Amicus disagrees with Judge Kelly's assessment of defense counsel's position as well as Judge Kelly's argument that Dupree's unlawful possession for self defense also excused his continued possession after the fight had ended. In this case there was no evidence presented establishing defendant Dupree had a reasonable belief that there was an immediate threat of serious bodily injury to him after he fled from the scene. Because there was no evidence presented establishing that his actions were the result of a reasonable fear for his safety, all elements of a justification defense under Judge Kelly's five point formulation were not established, thus the trial court's instruction here did not result in a miscarriage of justice. [See pp 15, 16, *supra*.]

Amicus also disagrees with Judge Kelly's conclusion that the trial court's supplemental jury instruction deprived defendant of his due process right to present a defense. As with many rights, the right to present a defense is not unlimited. The constitutional right to present a complete defense at a criminal trial was clearly established by Supreme Court precedent. See e.g., *Chambers v Mississippi*, 410 US 284 (1973); *Rock v Arkansas*, 483 US 44 (1987). As with many rights, the right to present a defense is not unlimited. The criminal defendant "must comply with

established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence at trial." *Id.* For the reasons stated herein, defendant Dupree was not entitled to instructions on "justification" [duress] theory] and reversal and "remand for a new trial consistent with this opinion" is most inappropriate. 284 Mich App at p 112.

Amicus respectfully submits that Judge Kelly's approach to determining whether reversal is required for claimed instructional error is inappropriate. Judge Kelly's argument is inconsistent with defendant's testimony and speculative at best. Again, a jury instruction on justification should not be given if [the defense] lacks evidentiary support or is based upon mere suspicion or speculation. *United States v Kemp*, 546 F3d 759, 765 (6th Cir. 2008).

Defendant Dupree's tossing a loaded pistol out of his companion's truck on a service drive in a crime ridden city such as Detroit, is not a reasonable legal alternative to dispossessing himself of the gun. Defendant did not testify that he kept the gun only as long as necessary for his protection. Defendant was intentionally fleeing from the crime scene of an assault with intent to murder in his companion's vehicle as a passenger and only threw the weapon out after he was told to do so. What is certain here is that defendant Dupree was not dispossessing himself of the weapon to avoid a charge of felon-in-possession. On the contrary it is submitted that defendant Dupree's conduct was not only unreasonable, but he was also in the act of suppressing evidence of criminal conduct. Does Dupree's conduct constitute a justification defense? *Amicus* says: No.

In *State v Coleman*, 556 NW2d 701 (1996) the Wisconsin Supreme Court explains:

> ... [N]either the trial court nor this court may, under the law, look to the "totality" of the evidence ... in determining whether the instruction was warranted. To do so would require the court to weigh the evidence – accepting one version of facts, rejecting another – and thus invade the province of the jury ... *Mendoza*, 258 NW2d 260; accord *State v Jones,* 434 NW2d 380 (1989). **Thus, neither the trial court nor the reviewing court may weigh the evidence, but instead may only ask whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the alleged defense. *Mendoza, supra; Jones, supra.*** "If this question is answered affirmatively, then it is for the jury, not the trial court or this court, to determine whether to believe defendant's version of the events." *Mendoza, supra, Jones, supra.*
>
> Note *Gant* does not provide under first prong that defendant's conduct may be privileged where he reasonably believes he is under an unlawful, present imminent and impending threat. [p7 of Coleman]***

Judge Kelly's improper weighing of the evidence and his suggestion that the jury **could have found** defendant needed to possess the weapon beyond the time of his assault on Reeves to protect himself from further aggression by Reeves is not supported by defendant's testimony or any other evidence.

* * *

In *United States v Dutton*, 2008 WL 1927354 (D. Utah) under the heading "NECESSARY TIME TO AVOID DANGER" the Court considered whether the defendant possessed the firearm beyond a reasonable time to avoid danger. The Court said:

> Continued possession beyond the time that the emergency exists, on its own, will nullify an attempt at a necessity defense. [FN 55] The defense of necessity can only be employed for possession during the time he is endangered-possession of a firearm for a significant period after its violation. [FN 56] Courts have rejected the necessity defense

> on the ground that the defendant maintained possession of the firearm longer than absolutely necessary to abate the danger. [FN 57]

In *Dutton* the defendant possessed the weapon for nearly six weeks after the March 24 incident. At the time defendant was found in possession of the firearm, the period of endangerment had long since lapsed.

In the case *sub judice*, on July 17, 2006, ten months after the assaults on Reeves and Horton, defendant Dupree was admittedly in possession of a .38 caliber pistol similar to the one defendant used to shoot victim Reeves on September 11, 2005. The trial court here opined that the jury in this case could properly conclude that defendant was guilty of felon in possession where he was admittedly in possession of a .38 caliber pistol said to be similar to the one he used in shooting Reeves. [Trans. 2008]****

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Amicus respectfully submits that assuming that the justification defense is available and that defendant made a sufficient showing with respect to first and second elements, per Judge Kelly's five part test, no reasonable juror could conclude that the facts offered by Dupree show that he had no reasonable, legal alternative to violating the law by his continued possession of the weapon. Defendant thus failed to meet the requirements of the 3rd, 4th and 5th elements. [See pp 15, 16, *supra*.] The decisions "consistently refuse to recognize justification as a defense where the defendant failed to pursue lawful options, particularly when violating section 922(g)(1)." *United States v Bell*, 411 F3d 960, 964 (8th Cir. 2005).

In the recent case of *United States v Holliday*, 457 F3d 121 (1st Cir. 2006) the court pointed out that the 1st Circuit had not decided whether a defendant charged with felon in possession of a handgun may assert as an affirmative defense that he was justified in his possession, though it appeared that the court had assumed such a defense was available, citing *United States v Diaz*, 285 F3d 92, 97 (1st Cir. 2002). The court found there was no basis for a justification instruction:

> As we indicated above, to prevail on the theory that he terms self-defense, the defendant would have had to show legal justification *both* for his seizure of Lydstone's gun *and* for keeping the gun as long as he did. This case does not require us to decide whether the defendant could have asserted self-defense for taking Lydstone's gun. Because the defendant kept the firearm even after seizing it in the purported act of self-defense, we can focus, like the district court, on the defendant's lack of justification for his continued possession.
>
> Rather than renouncing the gun as soon as any danger to his life had passed, the defendant kept and fired the gun. A necessity instruction is appropriate only where there is evidence sufficient to create a triable issue that a defendant "had no legal alternative but to violate the law." *United States v Ayala*, 289 F3d 16, 26 (1st Cir. 2002) (internal quotation marks omitted); see also *Bello*, 194 F3d at 27 (discussing basically identical requirement in duress defense). The district court relied on this principle in concluding that the defendant was not entitled to a necessity defense. The defendant had the obvious alternative of announcing to Lydstone upon taking the gun that he had no intention to use the weapon and wanted merely to end the altercation peacefully and turn himself in. In other words, the defendant had a better legal alternative to continued possession of the gun and indisputably did not choose that alternative. Similarly, the defendant could not assert self-defense as a justification for his continued possession because he could not claim that after taking the gun he still "reasonably believe[d] that [force] [was] necessary for the defense of [himself] against the immediate use of unlawful force. *Bello,* 194 F3d at 26 The defendant was not entitled to any justification instruction.

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Under the decisions the trial court may preclude a defendant from presenting a defense where the evidence is legally insufficient

In *United States v Williams*, 389 F3d 402 (2d Cir. 2004) the court explains that a trial judge may preclude a defendant from presenting a defense where the evidence to support the defense would be legally insufficient. *United States v Villegas*, 899 F2d 1324, 1342 (2d Cir. 1990), *United States v Paul*, 110 F3d 869, 871 (1997). The Court cites several decisions where the defendants had failed to establish one or more of the elements to warrant the presenting a necessity or justification type defense.

In *United States v Hodge*, 103 Fed.Appx. 686, 2004 WL 1567869 (C.A.2 (NY) (Not selected for publication in the Federal Reporter) the defendant was charged with felon-in-possession of a firearm, 18 USC 922(g)(1), moved to instruct the jury on the defense of justification. The trial court rejected the motion since there was no evidence indicating whether there were any legal alternatives to defendant obtaining the gun the defendant failed to bear his burden of submitting evidence sufficient to warrant the presentation of a justification defense. Accordingly, the district court did not err in excluding the defense from jury consideration.

Under the decisions the trial court may instruct the jury to disregard a justification defense

In *United States v Kopp*, 562 F3d 141 (2d Cir. 2009) the court upheld a jury instruction advising the jury that it could not consider a justification defense. The defendant challenged the following instruction where the district court stated: "[a]n act is done unlawfully if it is done without justification or excuse. I have found as a matter of law that there is no basis for a justification defense to be considered by you in determining whether the defendant acted unlawfully." The Court of Appeals held this instruction did not take the question of whether Appellant acted unlawfully out of the jury's hands. Rather, it merely prevented the jury from concluding that Appellant

had not acted unlawfully based upon a defense that was not legally warranted by the evidence."

In *United States v White*, 552 F3d 240 (2d Cir. 2009) the defendant was jury convicted felon-in-possession of a firearm. Defendant argued the trial court erred in stating 18 USC 922(g)(1) "contains no defenses" because many Circuits have recognized affirmative defenses to felon-in-possession liability even though these defenses do not appear in the statute. The court found the challenge to be without merit stating that "Even if we assume that the defenses invoked by White should be read into section 922(g)(1), the district court's charge was not erroneous. The court explained:

> ... A district court need not instruct on an affirmative defense where the defendant has failed to provide a sufficient evidentiary foundation. (citation) Because White did not adduce sufficient evidence to have the issue of justification considered by the jury, it was not erroneous for the district court to eliminate from its charge defenses that did not pertain to White's case. Moreover, even if the district court *did* err by stating that there are no affirmative defenses applicable to section 922(g)(1), White could not conceivably have been prejudiced by such an error since these potential defenses did not apply to him.

The Court also rejected White's argument that it was improper for the district court to state that "[t]he evidence ... does not support any possible defense," because this statement suggested that the court had assessed the credibility of White's testimony and found it wanting.

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Judges Kelly and Gliecher, for reversal, contend that the trial court's supplemental instructions deprived defendant of a defense. The major flaw of this argument is that the instruction did not make submission to the police an independent element to a justification defense. A fair reading of the instruction is that invites the jury to consider submission to the

police as one factor in evaluating the justification defense, that is, the defendant had no reasonable legal alternative to taking (maintaining or continued) possession. [See 284 Mich App at p 96]

The propriety of defendant's failure to contact the police, his flight and suppression of evidence was very much at issue in this case. Defense counsel asked defendant why he fled from the scene: "Why didn't you wait and tell the police what happened?" Defendant said he was scared to death and that he did not want to go back to prison. Defendant additionally explained he threw the gun out of the getaway vehicle when his companion told him to get it out of her truck. Defendant said he was arrested ten months later, but said he was going to turn himself in but his wife was seven months pregnant. [Transcript pp 31, 32]

The prosecutor questioned defendant about his flight and disposition of the gun. Defendant said he tossed the gun on to the service drive after his companion said to get it out of her truck. Defendant was asked about suppression or spoliation of evidence, i.e., defendant was asked if he had gloves on when he tossed the gun and he said: "No." Defendant agreed that his fingerprints would have been on the gun. [p 37] He said that after tossing the gun he just went to his girlfriend's house. Defendant agreed that ten months after the incident he had a 38 caliber pistol in the car when he was arrested. [p 42]

In *United States v Mitchell*, 725 F2d 832 (2d Cir. 1983), a prosecution for armed bank robbery, the evidence was insufficient to warrant an instruction of the defense of duress. On appeal the court held that the risk that might have arisen from an incorrect statement as to the degree of proof required of the Government with respect to the defense caused no prejudice. The court explained:

> However, though the instruction on duress was erroneous, it does not require reversal because Mitchell failed to present sufficient evidence to put the defense in issue.

> Unless a defendant submits sufficient evidence to warrant a finding of duress, the trial court is not required to instruct the jury on that defense. [citations omitted] We have previously articulated the elements of the duress defense...
> ...Mitchell offered no testimony to support the element of lack of a reasonable opportunity to escape the threatening situation other than b engaging in the unlawful activity...
> Under these circumstances, the District Judge would have been justified in not submitting the duress charge to the jury. Submitting the charge gave Mitchell an opportunity to be acquitted on the basis of a defense to which he was not entitled. Moreover, our review of the record persuades us that the risks that might arise from an incorrect statement as to the degree of proof required of the Government caused no prejudice in this case Under these circumstances the jury instruction was harmless error.

Applying the rationale of cases such as *Mitchell*, *supra*, and the dissenting opinion of Judge Murray in this case, the error, if error there be, in the supplemental instructions was harmless. *cf.*, also *State v Rank*, 667 SW2d 461, 463 (Mo.App.1984); *People v Cuellar*, 76 Mich App 20 (1977) and West Crim. Law 110K1172.7 Errors favorable to defendant.

The decision of the Court of Appeals, if allowed to stand gives the subsequent illegal conduct of flight and destruction of evidence by the defendant the imprimatur of law. The Court of Appeals here is essentially holding that a defendant can base a justification defense on conduct that is indicative of guilt, that is, flight from a crime scene where he was charged with two counts of assault with intent to murder and his effort to suppress evidence of that crime by merely tossing the weapon out of the truck driven by his companion.

In the alternative, *Amicus* submits that the trial court's supplemental instruction was proper when contrasted with the instructions in *United States v Kopp*, *supra,* where the court instructed the jury that it could not consider a justification defense. In *Kopp*, even assuming *arguendo* that a justification defense was available as a general matter, in a prosecution for intentionally inflicting on a person, an injury resulting in death, because that person was a

provider of reproductive health services, the trial court nonetheless was entitled to preclude that defense if the evidence in support of a defense would be legally insufficient. The court instructed the jury that: "[a]n act is done unlawfully if it is done without justification or excuse. In this case, I have found as a matter of law that there is no basis for a justification defense to be considered by you in determining whether defendant acted unlawfully." The Court on appeal said that this instruction did not take the question of whether appellant acted unlawfully out of the jury's hands. Rather, it merely prevented the jury from concluding that appellant had not acted unlawfully based upon a defense that was not legally warranted by the evidence.

Just as in *United States v White*, 552 F3d 240 (2d Cir. 2009), *supra*, where it was proper to for the court to state that 18 USC 922(g)(1) contained no defenses, and it was not error to eliminate from its charge a defense that did not pertain to White's case, it was not error for the trial court in the case *sub judice* to instruct on the failure of defendant to turn the gun over to the police eliminated a claim of justification. In this case as in *White*, even if the court did err in effectively stating there are no affirmative defenses applicable to the felon in possession statute, Dupree could not conceivably have been prejudiced by such an error since these potential defenses did not apply to him.

In *United States v Jackson*, 282 Fed Appx 999 (3rd Cir. 2008) held that the 3rd Circuit did not recognize "transitory possession" or "temporary innocent possession" and that those defenses had been adopted only in one court of appeals, the District of Columbia Circuit, in *United States v Mason*, 233 F3d 619, 621 (D.C. Cir. 2001). The Court in *Jackson*, pointed out that it has been expressly rejected by the First, Fourth, Seventh, Ninth and Tenth Circuits, citing *United States v Teemer*, 394 F3d 59, 64 (1st Cir. 2005); *United States v Gilbert*, 430 F3d

215, 220 (4th Cir. 2005); *United States v Hendricks*, 319 F3d 993, 1007 (7th Cir. 2003); *United States v Johnson*, 459 F3d 990, 998 (9th Cir. 2006); *United States v Baker*, 508 F3d 1321, 1325 (10th Cir. 2007). In *Jackson* the defendant was convicted of felon in possession and on appeal argued that the District Court erred in refusing to permit a jury instruction on the affirmative defense of "transitory possession." The Court determined that the defendant presented no evidence to show he intended to turn the weapons over to the police or that he was pursuing such an intent with "immediacy and through a reasonable course of conduct." (citing *Mason*, 233 F3d at 624.) In *Jackson* where the defendant threw the two guns out of a window, the court said such conduct "certainly does not demonstrate and intent to turn the weapons[s] over to the police."

In other cases where the defendant contends that the trial court erred in finding that he was not entitled to raise a justification defense to felon in possession, the decisions uniformly hold, without exception, that the defense does not apply if there is a way to avoid committing the felony of possession by a felon.

In the very recent case of *United States v Kilgore*, 2010 WL 46011, citing *United States v Perez*, 86 F3d at 737 the court said "a defendant may not resort to criminal activity to protect himself or another if he has a legal means of averting the harm." The district court aptly outlined a range of legal avenues open to Kilgore, i.e., "After taking the gun off his brother, he could have called the police. He could have given the firearm to a nonfelon adult. He could have put the revolver somewhere in the apartment that the children could not have reached. Having eschewed these options, Kilgore cannot appeal to the defense of necessity." The district court rejected the defendant's noble motives, which found defendant's actions were motivated by a desire to conceal the gun, and its use in the morning's nefarious

activities, from the police. The court on appeal adhered to the district court's factual determination unless clearly erroneous, and said that "Based on our review of the record, we find no basis for questioning the court's conclusion, let alone finding it to be clearly erroneous."

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On another ground defendant's felon-in-possession conviction should be affirmed not only because a justification defense was not established as to the events of September 5, 2005 but also because there was absolutely no defense to his possession of a .38 caliber pistol at the time of his arrest on July 17, 2006.

The felon-in-possession statute prohibits a convicted felon from possession a firearm. MCL 750.224f. The statute focuses on the criminal status of a possessor of a firearm; and the aim is to keep guns out of the hands of those most likely use them against the public. *People v Dillard,* 246 Mich App 163 (2001), *lv* denied. 466 Mich 864. It is a general intent crime. *People v Fennell*, 260 Mitch App 261, 266 (2004) (a general intent crime requires only the intent to perform the physical act itself). *People v Burgess*, 419 Mich 305, 308 (1984).

The federal felon in possession statute, 18 USC 922(g) does not require that the defendant possess a particular firearm to be an element of the offense. MCL 750.224f likewise does not require that defendant possess a particular firearm to be an element of the offense. [MCL 750.224f provides: (1) Except as provided in subsection (2) a person convicted of a felony shall not possess ... a firearm in this state ..."]

Several recent federal decisions, citing *United States v Verrecchia*, 196 F3d 294, 301 (1st Cir. 1999) (noting that "Congress did not intend the possession of a particular firearm to be an element of a section 922(g)(1) and *United States v Leahy*, 473 F3d 401, 409-10 (1st Cir. 2007) (stating that "there is no need for unanimity within the relevant unit of

prosecution, that is, with respect to weapons possessed 'in one place at one time'" (quoting I *Verrecchia*, 196 Fe3d at 298) have held that jury unanimity on the specific firearm is not required.

In *United States v Leahy*, 473 F3d 401 (1st Cir. 2007) the defendant was charged in a single count mentioning two guns, a pistol and a rifle. The prosecution presented evidence at trial about both weapons and the jury returned a general verdict. Defendant argued he may have been convicted because some jurors believed he possessed the rifle while others believed he possessed the pistol but did not act in self-defense. To safeguard against this possibility, his thesis ran, the district court should have instructed the jury that unanimity as to the identity of the weapon unlawfully possessed was required for conviction. Because Leahy did not request an instruction below the issue was held to be forfeited, but could be reviewed on appeal only for plain error. The court said that it was settled law that "Congress did not intend the possession of a particular firearm to be an element of a section 922(g)(1) violation citing *United States v Verrechia*, 195 F3d 294, 301 (1st Cir. 1999). Consequently, there was no need for unanimity within the relevant unit of prosecution, that is, with respect to weapons possessed "in one place at one time. *Id* at 298. Had the objection been preserved the court would have been forced to delve into the geography of the relevant unit of prosecution and determine whether the pistol taken from a kitchen drawer one evening) and the rifle (stowed in the pantry but perhaps handled at some indeterminate point) were sufficiently related in "time" and "place". But the objection was not preserved in *Verrecchia* where it was said to be tenebrous as to the temporal and spatial contours of the "relevant unit of prosecution." That combination was held to defeat a claim that an obvious error occurred. Hence Leahy could not satisfy the strictures of plain error review. See also *United States v Ingram*, 2003

WL 27113434; *United States v Buchmeier*, 255 F3d 415 (7th Cir. 2001); *United States v Booker*, 553 F.Supp. 9 (2008); *United States v Jackson*, 479 F3d 485 (7th Cir. 2007). See also *United States v Charles Stone, et al.*, 323 F Supp 2d 886(U.S.D.C. Ed, Tenn. 2994); *United States v Carey*, 599 F Supp 2d 50(U.S.D.C. Minn. 2009).

In Michigan, a court may amend an information at any time before, during or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and proofs, as long as the defendant is not prejudiced by the amendment and does not charge a new crime. *People v Goecke*, 457 Mich 442, 459-460 (1998); MCR 6.112(H). While the Information in this case charged defendant with felon-in-possession on September 11, 2005, it was also proven at trial that he possessed .38 caliber pistol at the time of his arrest some ten months later. With respect to either date defendant failed to establish entitlement to instructions regarding the defense of "justification" because he did not present any evidence to support the defense so as to warrant the instruction.

In light of the evidence in this case and the above referenced decisions, this Court if necessary, may amend the information to charge defendant with felon in possession of a weapon on September 17, 2006 and thus affirm his conviction since defendant failed to present any evidence to support a justification defense to his admitted unlawful possession the .38 caliber pistol on that date. MCR 7.316(7) provides that this Court, may at any time, in addition to its general powers "enter any judgment or order that ought to have been entered, and enter other further orders and grant relief as the case may require; ..."

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If a retrial is required, trial would be for felon-in-possession only. Based on the evidence as we know it, on a prosecutor's motion *in limine*, the trial court would be warranted

in precluding the defense altogether. In the alternative, the trial court would be warranted in instructing the jury that under the law a justification defense was not a consideration.

To allow the Court of Appeals reversal to stand and grant defendant a new trial in this case even though the supplemental instructions were not erroneous or harmless at best, compromises the "integrity or public reputation" of judicial proceedings and invites justified public scorn. See *United States v Jumah*, 493 F 3d 868 (7th Cir. 2007) citing *Johnson*, 520 US at 470, 117 S Ct 1544 (quoting Roger J. Traynor, The Riddle of Harmless error 50 (1970). Accordingly, Amicus would urge this Court to reverse the Court of Appeals below and thus reinstate defendant's conviction for felon-in-possession of a weapon.

Relief

The Prosecuting Attorneys Association of Michigan urges this Honorable Court to reverse the Court of Appeals and to reinstate defendant's felon-in-possession conviction.

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Respectfully submitted

Donald A. Kuebler

Donald A. Kuebler P16282
Chief, Research, Training & Appeals
Genesee County Prosecutor's Office